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No. 93-1776

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In the Supreme Court of the United States

OCTOBER TERM, 1994

GORDON L. HALL, ET AL., PETITIONERS

v.

VAL JOHN GREEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's decedent was injured "in the course of activity incident to service" for purposes of the intramilitary immunity defense recognized in *Feres* v. *United States,* 340 U.S. 135, 146 (1950), and later decisions of this Court.

2. Whether the government was entitled to reimbursement from petitioner under 42 U.S.C. 2651 for the medical care it provided to a servicemember who was injured when the car that petitioner's decedent was driving collided with another vehicle.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A39-A50) is reported at 8 F.3d 695. The opinion of the magistrate judge (Pet. App. A28-A38) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51-A53) was entered on October 29, 1993. A petition for rehearing was denied on February 9, 1994. Pet. App. A54-A56. The petition for a writ of certiorari was filed on May 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This is an action by respondent Val John Green for injuries that he sustained in a car accident on July 8, 1989. At the time of the accident, Green was in the United States Army Reserve. The accident occurred when the car in which Green was a passenger collided with a truck owned by the Salvation Army. The car in which Green was riding was driven by a fellow Reservist, Michael Coffman. The accident killed Coffman and seriously injured Green. Pet. App. A44.

The federal magistrate judge made findings about some of the events that led up to the accident, as follows: Green and Coffman began a weekend of inactive duty training at the Portland (Oregon) Air Base on the evening of Friday, July 7, 1989. After a training exercise, the two men returned to the base with the rest of their company at 3:00 a.m. on Saturday, July 8. The company was allowed either to stay on the base or to leave the base until the first formation at 9:00 or 9:30 a.m. that same day. Green and Coffman stayed on base until about 6:00 a.m., when they and a third man, Sergeant McMahan, left the base to eat breakfast. According to McMahan (in testimony that the magistrate judge did not credit), they planned not only to get breakfast but also to buy doughnuts to bring back for other members of the company and to stop at Green's house for training materials. Green and Coffman left in Coffman's car, with Coffman driving; McMahan left the base a few minutes later in his car. McMahan lost track of the other two men; he ate breakfast alone and returned to the base. Coffman and Green collided with the Salvation Army truck at about 8:45 a.m. At the time of the collission, their car was headed away from the base and was not on the most direct route to Green's home. Neither doughnuts nor training materials were found in the car. Green

claimed that he did not remember the events of that Saturday morning. Pet. App. A30-A32.

2. a. Green (respondent here) filed this action for damages in Oregon state court. He named as defendants Coffman's estate, the personal representative of the estate (petitioner Hall), the Salvation Army, and the driver of the Salvation Army truck. He alleged that the accident was caused by the negligence of both Coffman and the truck driver. Pet. App. A1-A4.

Coffman's estate responded in three ways. It removed the action to the United States District Court for the District of Oregon under 28 U.S.C. 1442(a)(1).[1] It asked the Attorney General to certify that Coffman was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. 2679(d)(1).[2] And it filed a third-party claim against the United States, alleging that the United States was liable for any judgment against the estate because Coffman was acting within the scope of his employment when he collided with the truck. Pet. App. A32-A33, A44.

After the government was added as a third-party defendant, it filed a claim against Coffman's estate seeking reimbursement under 42 U.S.C. 2651 for the medical care it gave Green. Pet. App. A33.[3]

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[1] 28 U.S.C. 1442(a)(1) authorizes the removal from state court to federal court of any action against "[a]ny officer of the United States or any agency thereof, or person acting under him, for any act under color of such office."

[2] When the Attorney General makes such a certification under 28 U.S.C. 2679(d)(1), the action is deemed to be an action against the United States, rather than the individual employee, under the Federal Tort Claims Act, and the United States is substituted for the employee as the defendant.

[3] 42 U.S.C. 2651(a) provides that when the government is authorized or required to render medical care to an injured person and does

b. The Attorney General refused to certify that Coffman was acting within the scope of his employment. The estate moved the district court for such a certification under 28 U.S.C. 2679(d)(3). A magistrate judge recommended that the motion be denied. He based that recommendation on his conclusion that "Coffman's destination and motivation at the time of the accident could not be determined," and that "even if Coffman had been driving to retrieve [Green's training materials], [Coffman] probably would have been acting outside the scope of his service-related employment." Pet. App. A33-A34. The district court adopted that recommendation and denied the motion for certification. *Id.* at A44. Coffman's estate appealed that ruling to the Ninth Circuit. *Id.* at A34, A44; see *Pelletier* v. *Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992) (denial of certification motion is final order appealable under 28 U.S.C. 1291).

c. Coffman's estate opposed both the government's reimbursement claim and Green's negligence claim by asserting the defense of intramilitary immunity, which immunizes the government from liability under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, for "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres* v. *United States*, 340 U.S. 135, 146 (1950). The Ninth Circuit has extended the doctrine to suits between individual servicemembers for injuries incident to service. See, *e.g.*, *Lutz* v. *Secretary of the Air Force*, 944 F.2d 1477, 1480-1481 (9th Cir. 1991); *Johnson* v. *United States*, 704 F.2d 1431 (9th Cir. 1983). Coffman's estate moved for a separate trial on its immunity defense, which the magistrate judge construed (with the parties' consent) as a motion for summary judgment. Pet. App. A34.

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so, it has "a right to recover" the "reasonable value" of that care from the person whose negligence caused the injury.

The magistrate judge, in a report adopted by the district court, rejected the immunity defense asserted by Coffman's estate. Pet. App. A28-A38. He determined that, "[f]rom the evidence in the record, a trier of fact could conclude only that [Green] and Coffman were engaged in 'distinctly nonmilitary acts' when the accident occurred." *Id.* at A37. He explained (*ibid.*):

> The evidence does not support the conclusion that [Green] and Coffman were acting under any military orders or directions at the time of the accident. The alleged negligent act in question occurred off-post, while [Green] and Coffman were on their own time, performing acts of their own choosing, not acts which they had received military instructions to perform. The accident occurred while [Green] and Coffman were riding in a private vehicle, not long before they were due to attend the first formation.

The magistrate judge did not accept the assertion of Coffman's estate that one purpose of the drive was to pick up training materials at Green's house. He noted that Coffman and Green were "not traveling on a route that would have led them most directly to Green's house," and that "[n]o training materials were found in Coffman's automobile." *Ibid.* The magistrate decided that "[i]n the absence of facts from which a trier of fact could conclude that [Green] and Coffman were acting 'incident to military service,' " Green and the government were entitled to summary judgment on the defense of intramilitary immunity asserted by Coffman's estate. *Id.* at A38.

3. The Ninth Circuit affirmed the denial of the estate's motion for certification and the rejection of the estate's defense of intramilitary immunity. Pet. App. A39-A50. The Ninth Circuit held that it was "not clearly erroneous" for the magistrate (and, by adoption, the district court) to

find that Coffman and Green did not leave the base to get training materials. *Id.* at A48. The Ninth Circuit determined that the evidence before the magistrate judge "suggest[s] that the two Reservists could have intended to pick up training materials, but [it] equally support[s] the conclusion that the Reservists were after doughnuts or just breakfast." *Ibid.* The court also noted that, at the time of the accident, the two men were off-base and "had no duties." *Id.* at A48-A49.

ARGUMENT

Petitioner contends (Pet. 5-13) that the court of appeals erred in holding that the injuries sustained by petitioner's decedent were not "incident to service" for purposes of the *Feres* doctrine. That factbound holding, however, is correct and does not conflict with any decision of this Court or that of any other court of appeals.

1. Petitioner does not contend that the courts below applied an erroneous standard to the facts of this case, nor could he do so. The courts below simply applied the standard enunciated in *Feres,* which bars FTCA recovery for injuries "incident to service." 340 U.S. at 146. Moreover, petitioner does not directly challenge the finding below that, when the accident occurred, Green and Coffman were not going to get training materials. Such a challenge, in any event, would not merit further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317 n.5 (1985).

Instead, petitioner contends that the government was precluded as a matter of law from opposing his defense of intramilitary immunity. He relies on the facts (1) that an Army investigator found that Coffman and Green were on their way to get training materials when the accident

occurred; and (2) that the Army determined that Coffman was acting "in the line of duty" for the purpose of making him eligible for various military benefits. This argument is without merit.

Certain agency proceedings "may well have preclusive effect" in later judicial proceedings. *Hayfield N.R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 636 n.15 (1984); see *United States* v. *Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). Moreover, the preclusive effect of an administrative proceeding may encompass both issue preclusion and claim preclusion. See *Astoria Fed. Savings & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 106 (1991); *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461, 484 n.26 (1982); see also *Hayfield*, 467 U.S. at 636 n.15 (administrative claim preclusion); *University of Tennessee* v. *Elliott*, 478 U.S. 788, 797-798 (1986) (administrative issue preclusion). The action of an administrative agency has preclusive effect, however, only "[w]hen [the] * * * agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Utah Constr.*, 384 U.S. at 422.

Petitioner has not shown that the Army's investigation in this case satisfied the conditions for administrative preclusion. Specifically, he has not shown that the Army investigator was "acting in a judicial capacity" when he determined that petitioner's decedent was injured in the line of duty. Nor has petitioner shown that the investigation partook of an adversary proceeding in which parties disputed whether the injuries were sustained in the line of duty.[4] Because petitioner did not show that the Army in-

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[4] In particular, the government was not in the position of a litigant with an opportunity to challenge the investigator's finding that Coffman and Green were on their way to get training materials when the

vestigation had "the adversariness and adequacy of administrative proceedings" necessary for preclusive effect, it did not bar the government from opposing petitioner's immunity defense. See *Nasem* v. *Brown*, 595 F.2d 801, 806 (D.C. Cir. 1979).

Moreover, the Army's determination that the injuries of petitioner's decedent were sustained in the "line of duty" (Pet. App. A61-A65) was not tantamount to a determination that the injuries were "incident to service" for purposes of *Feres*. As petitioner concedes (Pet. 7), the relevance of a line-of-duty determination is in determining a servicemember's entitlement to military benefits. That function is reflected in the line-of-duty regulation, which states that "a person stands to lose substantial benefits as a consequence of his or her actions." Army Reg. 600-8-1 § 39-1, *reprinted at* Pet. App. A59. That function is also reflected in the line-of-duty inquiry, which primarily focuses on whether a servicemember should be barred from receiving benefits because of his or her "intentional misconduct or willful negligence." *Ibid.* ("A person who becomes a casualty because of his or her intentional misconduct or willful negligence can never be said to be injured, diseased, or deceased in the line of duty."); *id.* § 39-2 ("Line of duty investigations are conducted essentially to arrive at a determination as to whether misconduct or negligence was involved."), *reprinted at* Pet. App. A59.

The purpose of the *Feres* doctrine and the focus of an inquiry as to its applicability differ significantly from those of a line-of-duty determination. See generally *Feres*, 340 U.S. at 142-146; see also *United States* v. *Johnson*, 481 U.S. 681, 688-691 (1987); *United States* v. *Shearer*,

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accident occurred. Thus, that finding did not bar the government in this case from litigating the issue of the purpose of the two men's trip.

473 U.S. 52, 57-59 (1985). The lower courts accordingly have recognized that a servicemember may not have been acting "incident to service" even though he or she was acting "in the line of duty," and vice-versa. See *Lauer* v. *United States*, 968 F.2d 1428, 1429-1430 (1st Cir.) (*Feres* barred servicemember's suit against the government for injuries he sustained from a car that hit him when he was walking down a Navy-maintained road, returning to base from liberty; injuries were "incident to service," notwithstanding Navy's determination that they were not "in the line of duty"), cert. denied, 113 S. Ct. 812 (1992); *Parker* v. *United States*, 611 F.2d 1007, 1008, 1011-1012 & n.6 (5th Cir. 1980) ("an off-duty serviceman on a four-day 'furlough' proceeding on a roadway within a military reservation to his off-base home" was not "acting incident to his military service," even though his injuries were sustained "in the line of duty" for purposes of statutory benefits). Those decisions support the Ninth Circuit's conclusion in this case that "[t]he Army's administrative finding that Coffman was acting in the 'line of duty' the morning of the accident is irrelevant since i[t] addresses whether Coffman was engaged in misconduct and his eligibility for medical benefits." Pet. App. A48 n.7; cf. *Kremer*, 456 U.S. at 479.[5]

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[5] Some courts have stated in dictum that the "incident to service" standard is broader than the "line of duty" standard. See, *e.g.*, *Lauer*, 968 F.2d at 1429; *Hale* v. *United States*, 416 F.2d 355, 358 (6th Cir. 1969); *United States* v. *Carroll*, 369 F.2d 618, 622 (8th Cir. 1966). Those statements suggest that an injury sustained in the "line of duty" is necessarily sustained "incident to service." The courts have made such statements to explain why an injury in a particular case may have occurred "incident to service"—and why compensation in a tort suit based on that injury is consequently barred under the *Feres* doctrine—even though the injury is not compensable as having occurred in the "line of duty." As discussed in the text, a more accurate explanation

2. Petitioner contends (Pet. 5, 7, 12) that the government cannot seek reimbursement under 42 U.S.C. 2651 for the medical care of a servicemember for injuries "incident to service." The court of appeals did not address that contention in light of its holding that the injuries of petitioner's decedent and Green were not "incident to service." Because that holding is correct, further review of petitioner's contention is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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for such a result is that the "incident to service" and "line of duty" determinations are made in different contexts and based on different considerations so that, although there may be overlap in the coverage of the doctrines, they are not congruent and each covers some activities that the other does not.